



Excise Tax Advisory

Excise Tax Advisories (ETAs) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

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BTA Nonacquiescence

The Board of Tax Appeals (the BTA), a separate agency from the Department of Revenue, decides both formal and informal administrative appeals from determinations made by the Department of Revenue. BTA decisions bind the Department only for the individual taxpayer's case and for the time period under appeal. BTA decisions in informal cases, by law, cannot be appealed by the Department.

All BTA decisions are available to the public. The Department does not always agree with adverse BTA decisions. In some cases the Department needs to inform the public, tax practitioners, and the Department's employees that it disagrees with an adverse BTA decision. The Department has decided to issue these statements via an ETA or ETA supplement to avoid misunderstandings about how the Department will apply these BTA decisions to other taxpayers' situations.

Any statement issued about a BTA decision may be withdrawn or modified at any time. The lack of a statement issued by the Department about any BTA decision has no meaning. It neither implies agreement or disagreement with a BTA decision.

This advisory is the first supplement to ETA 2009 and announces the Department's nonacquiescence to four BTA decisions. ETA 2009 and its supplements should not be discarded as these documents provide a history of all Department statements of nonacquiescence regarding adverse BTA decisions through an ETA or ETA supplement.

1. Olympic Tug and Barge, Inc.

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Olympic Tug and Barge, Inc.* 55558. (Issued 4/11/01.) *Olympic Tug and Barge* involved a taxpayer delivering bunker fuel to ocean-going vessels that moved directly to ports in other states or foreign countries. Olympic did not own or sell the fuel. It transported the fuel offshore to ships by tug or barge. Most of the bunker fuel was consumed outside the State of Washington on the high seas. Olympic's customers may have occasionally resold some of the bunker fuel outside the state.

The Department will not follow the Board's holding that for purposes of the public utility tax on fuel bunkering services under RCW 82.16.050(8), a taxpayer is transporting commodities when the fuel in question is consumed on the high seas and is never resold.

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2. TMS Mortgage Inc./The Money Store, Inc.

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *TMS Mortgage Inc./The Money Store, Inc.* 54718. (Issued 6/26/01.) *The Money Store* involved a taxpayer that created "REMICs"; a process regulated by Federal tax statutes in which the taxpayer pooled home mortgages into a trust. After selling most of the interest in the trusts, *The Money Store* realized a gain on sale that it recorded as income for its records. This gain was equal to the value of the interest Taxpayer retained in the REMICs. The Department will not follow the Board's holding that a taxpayer is entitled to treat such income as non-taxable home mortgage interest income under RCW 82.04.4292.

3. Tessenderlo Kerley, Inc.

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Tessenderlo Kerley, Inc. v. Department of Revenue*, Docket No. 55090. (Issued September 18, 2000.) *Tessenderlo Kerley, Inc.* involved a taxpayer that possessed ammonium thiosulfate, a chemical that was listed on the federal CERCLA hazardous substance list when that list was incorporated into state law under RCW Chapter 82.21. The federal government subsequently delisted ammonium thiosulfate, but the state took no action to remove ammonium thiosulfate for state Hazardous Substance Tax (HST) purposes. Constitutionally, the Department can not follow the Board's holding that ammonium thiosulfate was not subject to the HST, absent action by the state to remove the substance for Washington HST purposes. Ammonium thiosulfate is no longer subject to the HST due to legislative amendments effective July 1, 2002.

4. Sound Refining

The Department of Revenue does not acquiesce in the Board of Tax Appeals' decision in *Sound Refining v. Department of Revenue*, Docket No. 54723 (Issued 3/31/00). *Sound Refining* involved a fuel oil seller who prepared a Hazardous Substance Tax fuel-in-tanks credit certificate on behalf of a Canadian customer who was not entitled to issue such a certificate under WAC 458-20-252. The Department will not follow the Board's holding that a taxpayer is entitled to prepare such a certificate for its customer without having to demonstrate that the certificate is received from the customer in good faith.
